BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

IN THE MATTER OF:	)	
	)	
BellSouth Emergency Petition for Declaratory Rule and Preemption of State Action	)))	**WC Docket No. 04-245**

REPLY OF THE TENNESSEE REGULATORY AUTHORITY
IN OPPOSITION TO BELLSOUTH'S EMERGENCY PETITION

This matter is before the Federal Communications Commission ("FCC" or "Commission") upon the *Emergency Petition for Declaratory Ruling and Preemption of State Action* ("Petition") filed by BellSouth Telecommunications, Inc. ("BellSouth") on July 1, 2004. The Petition seeks an Order from the FCC preempting the June 21, 2004 decision of the Tennessee Regulatory Authority ("Authority" or "TRA") in TRA Docket No. 03-00119 and preventing the TRA from proceeding with a generic docket to adopt a permanent rate for switching. The TRA filed its *Opposition of the Tennessee Regulatory Authority to BellSouth's Emergency Petition* ("Response") on July 30, 2004.

In this Reply, the TRA respectfully submits that the Commission cannot and should not preempt the authority of state commissions to set just and reasonable rates, terms and conditions of Section 271 elements and that the proper forum to seek review of a TRA decision in a Section 252 interconnection agreement arbitration proceeding is in the federal district court. For these reasons and the reasons previously set forth in its Response, the Tennessee Regulatory Authority requests that the Federal Communications Commission dismiss BellSouth's Petition.

I. The Commission cannot and should not preempt state commissions' authority to set just and reasonable rates, terms and conditions of Section 271 elements.

The TRA respectfully submits BellSouth's Petition should be dismissed because preemption of the TRA's actions is inappropriate for the reasons indicated below.

A. The standards for preemption of a state commission action have not been met.

BellSouth's assertion that state commissions are preempted from regulating network elements pursuant to Section 271 is incorrect and should be rejected. State commissions are not preempted from arbitrating disputes involving Section 271 network elements or from establishing prices, terms and conditions for those elements pursuant to the methodology prescribed by the Commission because the test for federal preemption of state action has not been met. In *Lorrillard Tobacco Co. v. Reilly*, the United States Supreme Court set forth the test for preemption, stating

> State action may be foreclosed by express language in a congressional enactment, . . . by implication from the depth and breadth of a congressional scheme that occupies the legislative field, . . .or by implication because of a conflict with a congressional enactment.[1]

None of the factors necessary for preemption of state authority are present here.

1. There is no express language in the 1996 Act preempting state action.

The provisions of Section 271 do not preempt state authority to establish rates, terms and conditions for Section 271 elements. If Congress had intended the Commission to have such sole authority, it would have used language that demonstrated that intent, such as the language found in Section 251(e)(1) of the 1996 Act: "The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the

[1] 535 U.S. 525, 541, 1215 S.Ct. 2404, 150 L.Ed.2d 532 (2001)(citations omitted).

United States." Congress also could have used explicit language regarding preemption as it did when it directed the FCC to promulgate regulations to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public.[2] In that instance, Congress specified that "[t]o the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements."[3]

However, Congress refrained from enacting similar language that would have given the FCC exclusive authority over Section 271. The absence of such express language indicates there was no intent by Congress to give the Commission exclusive authority over Section 271 elements.

2. <u>The depth and breadth of the framework for regulation contained in the 1996 Act does not imply Congress intended occupation of the field by the Commission.</u>

In the 1996 Act, Congress has enacted a structure of "cooperative federalism" expressly giving states a role in regulation. Congress gave states a role by explicitly requiring the Regional Bell Operating Companies ("RBOCs") to offer Section 271 network elements pursuant to interconnection agreements or Statements of Generally Available Terms and Conditions (SGATs), which must be approved by state commissions pursuant to Section 252.[4] Further, Congress gave state commissions the authority to arbitrate any open issues arising from disputes over interconnection agreements, which, in this case, included Section 271 network elements.[5] It is clear from the provision of state commission involvement in the

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[2] 47 U.S.C. § 276(b)(1).
[3] 47 U.S.C. § 276(c).
[4] *See* 47 U.S.C. § 252(e) and 47 U.S.C. § 252(f).
[5] *See* 47 U.S.C. § 252(b)(4)(C).

regulatory framework that Congress did not intend federal occupation of the field of telecommunications service regulation to the exclusion of the states.

3. There is no implied preemption because state commission action does not conflict with the 1996 Act or Commission authority.

The TRA's actions are in compliance with Commission guidelines and in no manner conflict with Commission authority or the 1996 Act. It is undisputed that the Commission established Sections 201 and 202 as the pricing standard for Section 271 elements, such that the rate set must be just and reasonable as well as and nondiscriminatory.[6] It is equally clear, however, that state commissions may establish rates for Section 271 elements that are consistent with the standards of Sections 201 and 202. In the Triennial Review Order ("TRO"), the FCC states:

> Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act. Application of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements.[7]

Relying on the jurisdiction of the Commission to establish pricing guidelines, the TRA set an interim rate and opened a generic docket for the establishment of a rate for local switching pursuant to Section 271(c)(2)(B)(vi).[8] Pursuant to the guidelines cited above, the TRA acted on the pricing issue of switching as a Section 271 checklist item under the requirements of Section 271.

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[6] *See* 47 U.S.C § 201(b) and 47 U.S.C. § 202(a).

[7] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 03-36 (*Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*) 18 F.C.C.R. 16978, ¶ 663 (August 21, 2003).

[8] This determination was made pursuant to Section 252. There must be a retroactive "true up" of the interim rate once the permanent rate is set.

The TRA's actions do not conflict with the provisions of the TRO as has been suggested. The TRO specifically states "we are discussing the appropriate pricing standard for these network elements where there is no impairment."[9] Further clarification is provided in declaring that TELRIC pricing is not required for Section 271 elements.[10] Paragraph 663, as noted above, reads "the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, ..."[11] Paragraph 664 of the TRO states "whether a particular checklist element's rate satisfies the just and reasonable pricing standard of Section 201 and 202 is a fact-specific inquiry that *the Commission* will undertake in the context of a BOC's application for Section 271 authority or in an enforcement proceeding brought pursuant to Section 271(d)(6)."[12] This paragraph, if read in isolation, may indicate a different conclusion than the one intended. Instead, paragraphs 662 through 665 of the TRO must be read together in order to determine the complete process for Section 271 elements approval and review. In paragraph 662, the Commission affirmatively states that the prices, terms and conditions for Section 271 elements would comply with Sections 201(b) and 202(a).[13] This clarification is followed by paragraph 663, citing *AT&T v. Iowa Utilities Board*,[14] for the Commission's authority to

[9] *Id.*, ¶ 656.
[10] *Id.*, ¶ 659.
[11] *Id.*, ¶ 663.
[12] *Id.*, ¶ 664 (emphasis added).
[13] *Id.*, ¶ 662.
[14] *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 377-81, 119 S. Ct. 721, 142 L.Ed.2d 835 (1999). In that case, the Supreme Court compared Section 252(c)(1), requiring states to comply with regulations prescribed by the FCC, with Section 252(c)(2), which only required the states to establish rates for interconnection, services or network elements in compliance with Subsection 252(d) pricing standards. Noting a lack of parallelism, the Supreme Court found that Section 201(b) explicitly provides the FCC with rulemaking authority to carry out the provisions of the Act; therefore, specific reference in Section 252(d) was not necessary. 525 U.S., at p. 378.

establish a pricing methodology for Section 271 elements. Paragraph 664 states that the pricing standard is a fact-specific inquiry which occurs during an RBOC's Section 271 application.[15] It should be noted, however, that when reviewing Section 271 applications in the past, the Commission did not undertake the task of setting particular and specific rates for the competitive checklist items.[16] Instead, the Commission reviewed the rates that state commissions set for compliance with minimum federal standards, and the Commission approved applications even though rates for local services in the states varied vastly.[17] Finally, paragraph 665 outlines the enforcement procedures of the Commission after Section 271 approval is granted.[18]

Simple logic progresses one through the following steps: (1) the Commission has established that prices, terms and conditions for Section 271 elements must be in accordance with Sections 201(b) and 202(a); (2) the states will determine the prices, terms and conditions for Section 271 elements according to the methodology prescribed by the Commission; (3) the Commission will review the rates for Section 271 elements in the context of Section 271 applications; and (4) after Section 271 approval the Commission will enforce the established rates. The TRA's decision to set an interim rate, open a generic docket to establish a permanent rate and a true-up of the interim rate once the generic docket is complete fits

[15] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 03-36 (*Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*) 18 F.C.C.R. 16978, ¶ 664 (August 21, 2003).

[16] *See Sprint Comm. Co. v. FCC*, 274 F.3d 549, 556 (D.C. Cir 2001) ("when the Commission adjudicates § 271 applications, it does not – and cannot – conduct de novo review of state rate-setting determinations") *AT&T Corp. v. FCC*, 220 F.3d 607, 615 (D.C. Cir. 2000) ("The FCC does not conduct de novo review of state pricing determinations in section 271 proceedings, nor does it adjust rates…."); *In the Matter of Application of SBC Communications, Inc. et al. to Provide In-Region. InterLATA Services in California,* 17 F.C.C.R. 25650, ¶ 41 (Dec. 19, 2002) ("California 271 Order") ("we perform our section 271 analysis based on the rates before us").

[17] *See, e.g. Sprint Comm. Co. v. FCC*, 274 F.3d 549, 552 (D.C. Cir. 2001) (finding a Section 271 application for Kansas complied with the checklist although charges were higher than in Texas).

[18] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 03-36 (*Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*) 18 F.C.C.R. 16978, ¶ 665 (August 21, 2003).

squarely within this framework. There is no conflict with the 1996 Act, the TRO or Commission guidelines and, therefore, preemption is inappropriate in this matter.

B. State commissions must set just and reasonable rates for Section 271 elements for RBOCs' continued compliance with Section 271.

BellSouth has an obligation to provide Section 271 switching, even if UNE-P enterprise switching is no longer a required UNE pursuant to Section 251. In order to provide the industry a safe and certain transition period, it would be prudent for BellSouth to have approved rates in place for Section 271 elements before it ceases providing those elements at the rates approved for Section 251 elements. Otherwise, the competition created by the Section 271 process may be threatened by market uncertainty and the associated harm to competitive carriers. Obviously, such a result would be incompatible with the goals of the 1996 Act. Therefore, provided that state commissions set just and reasonable rates for Section 271 elements, state rate-setting for Section 271 elements would not interfere with the establishment of market rates for these elements.

The interim rate set by the TRA will not prevent BellSouth and ITC^DeltaCom from entering into negotiation of "arms-length agreements" which the Commission has recognized are one method of establishing rates, terms, and conditions for Section 271 elements. The TRA's actions merely restored certainty to the marketplace so that ITC^DeltaCom could continue its competitive efforts. In no way is BellSouth precluded from entering into negotiations to effect switching terms that it deems more favorable.

Finally, nothing in the 1996 Act or the TRO prevents a state commission from setting rates for Section 271 checklist elements under state law. In arbitrating interconnection agreements, state commissions plainly will set in the first instance the rates, terms, and conditions for Section 271 checklist items.[19] Indeed, Section 252(e)(3) of the 1996 Act explicitly provides that a state commission can "establish[] or enforc[e] other requirements of State law in its review of an agreement."[20] Under this authority, states clearly can set rates, terms, and conditions for checklist items not unbundled pursuant to Section 251, so long as they obey minimum federal law requirements and do not set rates that exceed just and reasonable levels.

II. <u>The proper forum for review of the TRA's action is federal district court.</u>

In its Petition, BellSouth requests a declaratory ruling "preempting a recent order of the Tennessee Regulatory Authority that illegally asserts enforcement authority."[21] BellSouth also requests that the FCC declare that "it, and not state commissions, enforce provisions of Section 271."[22] The TRA order to which BellSouth refers was a determination made by the TRA in an arbitration proceeding between BellSouth and ITC^DeltaCom where the rate for the leasing of network elements under Section 271 was an open issue the TRA was required to resolve. BellSouth was apparently aggrieved by that determination and its Petition is simply a request for relief from what it views as an unfavorable decision in that arbitration proceeding.

Congress specifically intended an aggrieved party in an arbitration proceeding to bring an action to review a state commission's determination in federal district court. Pursuant to Section 252(e)(6) of the 1996 Act,

> In any case in which a State Commission makes a determination under this section, any party aggrieved by such determination may bring an action in an

[19] *See Sprint Communications Co. L.P. v. F.C.C.*, 274 F.3d 549, 552 (D.C. Cir. 2001) (noting that the competitive checklist requirements are "enforced by state regulatory commissions pursuant to § 252").
[20] 47 U.S.C. § 252(e)(3); *see also* 47 U.S.C. § 251(d)(2) and 47 U.S.C. § 261.
[21] *Emergency Petition for Declaratory Ruling and Preemption of State Action*, p. 1 (July 1, 2004).
[22] *Id.*

> appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.[23]

Here, the TRA made a determination in an arbitration proceeding pursuant to Section 252. By the plain language of the statute, any party aggrieved by that determination may bring an action in an appropriate federal district court to determine whether the agreement or statement meets the requirements of Section 251 and Section 252. Courts have construed such federal court action to be the *exclusive* means by which an aggrieved party may seek review of a final state commission arbitration determination.[24]

The Administrative Procedures Act generally authorizes federal agencies, including the FCC, to issue declaratory rulings.[25] However, the FCC may not exercise this authority in contradiction of a clear expression of Congressional intent.[26] Congress specifically enacted Section 252(e)(6) to provide relief for a party aggrieved by a determination in a state commission arbitration in the appropriate federal district court. The generic authorization to issue declaratory rulings applicable to federal agencies is trumped by the specific provisions of Section 252(e)(6) of the 1996 Act. A request for a ruling by the federal district court, not a request for a declaratory ruling by the FCC, is the proper method for BellSouth to seek relief. BellSouth has requested relief in the wrong forum, and its request should be summarily dismissed.

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[23] 47 U.S.C. § 252(e)(6).

[24] *See, e.g., GTE North, Inc. v. Strand,* 209 F.3d 909 (6th Cir. 2000); *MCImetro Access Transmission Serv., Inc. v. BellSouth Telecomm., Inc.,* 352 F.3d 872, 875-76 (4th Cir. 2003) ("A party aggrieved by the state utility commission's resolution of disputed issues may seek review of that decision in federal district court, which has exclusive jurisdiction over such matters."); *MCI Telecomm. Corp. v. Bell-Atlantic Pennsylvania,* 271 F.3d 491, 512 (3d Cir. 2001) ("[A] state commission that decides to participate in that statutory scheme is on notice from the outset that it will be subject to suit, brought only in federal court, by any party aggrieved by its decision."); *MCI Telecomm. Corp. v. Illinois Bell Tel. Co.,* 222 F.3d 323, 337 (7th Cir. 2000) ("Congress envisioned suits reviewing 'actions' by state commissions, as opposed to suits reviewing only the agreements themselves, and that Congress intended that such suits be brought exclusively in federal court.").

[25] *See* 5 U.S.C. § 554(e).

[26] *See, e.g,. Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.* 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("If the intent of Congress is clear, that is the end of the matter; for . . . the agency, must give effect to the unambiguously expressed intent of Congress.").

WHEREFORE, for the foregoing reasons and for the reasons stated in its Response filed July 30, 2004, the Tennessee Regulatory Authority requests that the Federal Communications Commission dismiss BellSouth's Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 2004, a true and exact copy of the foregoing was filed electronically with the Federal Communications Commission. The original document has been delivered via U.S. Mail, postage pre-paid, to:

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In addition, a true and exact copy of the foregoing document was served on the following persons, via the method indicated:

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